No. 598

Supreme Court of the United States

OCTOBER TERM, 1961

DRAKE BAKERIES INCORPORATED,
Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DRAKE BAKERIES INCORPORATED prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on September 12, 1961.

Citation to Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 196 F. Supp. 148 and is printed in Appendix A hereto, *infra,* p. 1a. The original opinion of the United States Court of Appeals is reported in 287 F. 2d 155 and is printed in Appendix B hereto *infra,* p. 4a. The opinion of the United States Court of Appeals for the Second Circuit upo. re-argument *en banc* is reported in 294 F. 2d 399 and is printed in Appendix C hereto *infra,* p. 13a.

Jurisdiction

The judgment of the Court of Appeals was entered on September 12, 1961.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

Questions Presented

1. Were respondents entitled to have petitioner's action, brought under Section 301(a) of the Labor Management Relations Act of 1947 for violation of a no-strike clause contained in the collective bargaining agreement between the parties, stayed pending arbitration?

2. Did the even division of the active Judges in the Second Circuit upon reargument *en banc* affirm the original decision of the Court of Appeals for the Second Circuit or the decision of the District Court for the Southern District of New York?

Statute Involved

Section 301(a), Labor Management Relations Act of 1947; 29 USC §185(a), 61 Stat. 156:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement

Respondent Local 50, American Bakery & Confectionery Workers International AFL-CIO (hereinafter referred to as the "Union") is the collective bargaining representative for certain employees of Petitioner Drake Bakeries Incorporated (hereinafter referred to as "Drake").

Drake and the Union are parties to a collective bargaining agreement regulating their respective rights and obligations. This collective bargaining agreement includes the following pertinent provisions setting forth the grievance and arbitration machinery:

> "ARTICLE V—GRIEVANCE PROCEDURE
>
> (a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.
>
> In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.
>
> (b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is

reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided.

"ARTICLE VI—ARBITRATION

(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

(c) The decision of the Arbitrator shall be binding upon both parties for the duration of this contract.

(d) Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

(e) The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties."

A specific no-strike clause was also contained in the collective bargaining agreement:

"ARTICLE VII—NO STRIKES

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lockout for any reason during the terms of this contract, except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision."

On December 16, 1959 Drake announced to the Union Committee and to its employees that in order to meet competition it was scheduling production for the Saturday after Christmas, December 26, 1959, and the Saturday after New Year's Day, January 2, 1960. Despite the fact that the company clearly had the right to reschedule production, both as an inherent management prerogative and specifically under the collective bargaining agreement, the Union objected to the rescheduling. Instead of utilizing the grievance machinery available to it under the collective bargaining agreement, the Union chose to cause its members to engage in a one-day strike on January 2, 1960 in violation of both the no-strike clause of the contract and the grievance and arbitration machinery provided for in the contract.

Drake instituted this action under Section 301 in the United States District Court for the Southern District of New York seeking damages for that breach of the no-strike clause. The Union made a motion to stay the proceedings herein pending arbitration. This motion was granted by Chief Judge Sylvester Ryan in an opinion contained in Appendix A *infra*, p. 1a. Drake appealed to the United States Court of Appeals for the Second Circuit.

A panel consisting of Judges Swan, Lumbard and Moore unanimously decided that the breach of the no-strike clause was not covered by the arbitration clause of the contract and, hence, the Union's motion for a stay was improperly granted. The opinion of Judge Swan is contained in Appendix B *infra*, p. 4a.

The Court of Appeals for the Second Circuit granted the Union's motion for reargument *en banc*. Upon such reargument, the six active judges of the Second Circuit were evenly divided, Judges Lumbard, Moore and Friendly voting to sustain the original determination of the Court of Appeals and Judges Clark, Waterman and Smith voting to reverse that determination and restore the District Court decision. The entire Court, by a 4 to 2 vote, then determined that the effect of this evenly divided Court was to affirm the District Court opinion rather than the original Court of Appeals decision.

Basis of Jurisdiction of Federal Courts

The basis of jurisdiction of the United States District Court for the Southern District of New York is Section 301(a) of the Labor Management Relations Act of 1947, quoted in full text *supra*, p. 2.

Reasons for Granting the Writ

1. The first question presented is important in the administration of Federal law.

This case concerns the relationship of the two most important clauses in any collective bargaining agreement—the arbitration clause and the no-strike clause. As this Court stated in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 454, 455 (1957), and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574,

578, footnote 4 (1960), the no-strike clause is the consideration the employer receives for accepting an arbitration clause. Indeed, the no-strike clause is the only benefit which the employer receives from a collective bargaining agreement. Senate Report No. 150, 80th Congress, First Session, page 60.

Not only are the clauses in question the most important clauses in any collective bargaining agreement but their violation by a union jeopardizes the entire fabric of industrial peace between a particular employer and a particular union. It may be safely stated that a strike in violation of a no-strike clause by itself creates the most serious situation in labor-management relations. This case raises the question of whether a union which has ignored the grievance and arbitration clauses of a collective bargaining agreement and broken the no-strike clause, can then avail itself of the arbitration clause which it has thereby violated to prevent the judicial redress provided by Section 301 for that very violation.

The importance of this issue can also be seen by the large number of cases in the Federal courts considering the question. We will summarize the prior adjudications of this issue in Point 2 *infra*. Here we need only state that the Courts of Appeal for the First, Second, Fourth, Fifth, Sixth and Seventh Circuits and numerous District Courts have considered and passed upon this issue. The number of cases concerning this issue illustrates both the importance of the problem to unions and employers, and the frequency with which litigation on this issue arises. As a result, it becomes desirable for this Court to resolve the issue once and for all, so that not only can the Courts of Appeal and the District Courts decide this important issue uniformly but also, so that both unions and employers may know the consequences of violations of the all important no-strike clause.

2. The decision of the Second Circuit is in conflict with the decisions of the First, Fourth, Fifth, Sixth and Seventh Circuits, and District Courts in the Third Circuit.

In its original opinion the Second Circuit set forth the authority for denying a stay pending arbitration for a Section 301 action for violation of a no-strike clause, as follows:

> "Support for this conclusion is to be found in Markel Electric Products, Inc. *v.* United Electrical, Radio & Machine Workers, 2 Cir., 202 F. 2d 435, 437, which held that the alleged breach of the no-strike provision was not 'within the scope' of an arbitration clause which we read as at least as broad as the one now before us. Our conclusion also accords with decisions in a number of other circuits.[4]

4. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 25* v. *W. L. Mead, Inc.*, 1 Cir., 230 F. 2d 576; *Lodge No. 12, Dist. No. 37, I.A.M.* v. *Cameron Iron Works, Inc.*, 5 Cir., 257 F. 2d 467, 471, certiorari denied, 358 U. S. 880, 79 S. Ct. 120, 3 L. Ed. 2d 110; *International Union United Auto Aircraft* v. *Benton Harbor Malleable Industries*, 6 Cir., 242 F. 2d 536; *Hoover Motor Express Co.* v. *Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union No. 327*, 6 Cir., 217 F. 2d 49; *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union No. 34*, 7 Cir., 235 F. 2d 108. Also in accord are two decisions of the Fourth Circuit which were disapproved by this court in *Signal-Stat Corp.* v. *Local 475, United Electrical, Radio and Machine Workers*, 2 Cir., 235 F. 2d 298, certiorari denied, 354 U. S. 911, 77 S. 1293, 1 L. Ed. 2d 1428, discussed *infra*. See *United Electrical, Radio and Machine Workers* v. *Miller Metal Products, Inc.*, 4 Cir., 215 F. 2d 221; *International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co.*, 4 Cir., 168 F. 2d 33."

The Court then went on to discuss an earlier case in the Second Circuit, *Signal-Stat Corp.* v. *Local 475*, 235 F. 2d 298 (2 Cir., 1956) *cert. denied*, 354 U. S. 911 (1957), in which a 301 action for breach of a no-strike clause was stayed pending arbitration. After distinguishing that

case on its facts, the court went on to consider the treatment of the *Signal-Stat* case in other Federal courts as contrasted with the treatment of another Second Circuit case, *Markel Electric Products, Inc.* v. *United Electrical Workers*, 202 F. 2d 435 (2 Cir., 1953) in which a 301 action for breach of no-strike clause was not stayed.

> "While Signal-Stat has frequently been cited and followed for other rules there enunciated,[5] our research reveals only two District Court cases in which it was relied upon to hold that an alleged breach of a no-strike clause is an arbitrable issue,[6] and only one other in which that part of the Signal-Stat opinion was cited with approval,[7] although several courts, in post Signal-Stat cases, have followed Markel.[8]

5. E. g., Judge Learned Hand's opinion in *Council of Western Electric Technical Employees—National* v. *Western Electric Co.*, 2 Cir., 238 F. 2d 892, 895.

6. *Tenney Engineering, Inc.* v. *United Electrical, Radio and Machine Workers of America, Local 437, D.C.D.N.J.*, 174 F. Supp. 878; *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283, United Rubber Cork, Linoleum and Plastic Workers, D.C.D. Conn.*, 167 F. Supp. 817.

7. *Butte Miners' Union No. 1 of International Union of Mine, Mill and Smelter Workers* v. *Anaconda Co., D.C.D. Mont.*, 159 F. Supp. 431.

8. *Lodge No. 12, Dist. No. 37, I. A. M.* v. *Cameron Iron Works, Inc.*, 5 Cir., *supra*, note 4; *International Union, United Auto Aircraft* v. *Benton Harbor Malleable Industries*, 6 Cir., *supra*, note 4; *Gay's Express, Inc.* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local No. 404 D.C.D. Mass.*, 169 F. Supp. 834; *Structural Steel & Ornamental Iron Ass'n* v. *Shopmens' Local Union No. 545, D.C.D.N.J.*, 172 F. Supp. 354. The conflict between *Structural Steel, supra*, and *Tenney Engineering, supra*, note 6, has not yet been resolved by the Third Circuit."

In addition to the cases cited by the Second Circuit, there have been two other decisions by District Courts in the Third Circuit prior to the original decision herein denying a stay pending arbitration in actions for breaches

of a no-strike clause. *Harris Hub Bed & Spring Co.* v. *United Electrical Workers,* 121 F. Supp. 40 (M. D. Pa. 1954) and *Metal Polishers* v. *Rubin,* 85 F. Supp. 363 (E. D. Pa. 1949).

But further, after the original decision was issued and before it was withdrawn by the decision *en banc,* it was specifically cited and followed by two different Courts of Appeals and a District Court in still another Circuit. *Vulcan-Cincinnati, Inc.* v. *United Steelworkers,* 289 F. 2d 103 (6th Cir. 1961); *Sinclair Refining Co.* v. *Atkinson,* 290 F. 2d 312 (7th Cir. 1961), *petition for writ of certiorari pending; Yale & Towne Mfg. Co.* v. *Local Lodge No. 1717,* 194 F. Supp. 285 (E.D. Pa. 1961), *appeal to Third Circuit pending.*

Thus, when the Court of Appeals withdrew its original decision and reinstated the District Court decision it conflicted with the decisions of the First, Fourth, Fifth, Sixth and Seventh Circuits and the decisions of four different District Court Judges in the Third Circuit holding the breach of a no-strike clause to be not arbitrable.

The decision of the Second Circuit withdrawing the original opinion merely states that the Judges in favor of withdrawal "point to the three recent decisions of the Supreme Court in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 1960, 363 U. S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; *United Steelworkers of America* v. *American Mfg. Co.,* 1960, 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 1960, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424."

First we submit that the *Steelworkers* cases support Drake's contentions. They demonstrate the uniquely critical importance of a no-strike clause and hence the necessity for providing judicial redress for its violation. See

United Steelworkers v. *Warrior & Gulf Navigation Co., supra.* Indeed, as we will demonstrate in Point 3 *infra, United Steelworkers* v. *American Mfg.* itself specifically upholds Drake's position by citing with approval a case sustaining that position.

But even if we accept the point of view of these three Judges and consider that the three *Steelworkers* cases rendered all prior decisions obsolete and hence inapplicable, there still remains a split between the Circuits. In all three decisions on this issue which have been decided since this Court's determinations in the *Steelworkers* cases (other than the instant case), the courts have specifically considered the *Steelworkers* cases and have held that they do not change the rule prevailing in the overwhelming majority of circuits which have considered the issue that actions for violations of a no-strike clause cannot be stayed pending arbitration. *Vulcan-Cincinnati, Inc.* v. *United Steelworkers, supra, Sinclair Refining Co.* v. *Atkinson, supra, Yale & Towne Mfg. Co.* v. *Local Lodge No. 1717, supra.* Thus, even if we were to consider only the cases decided after the *Steelworkers* cases as pertinent, the decision herein withdrawing the original opinion is in conflict with decisions of the Sixth and Seventh Circuits and the Eastern District of Pennsylvania.

We should point out that the decision in the other Circuits rests on a variety of rationales. Some rest on the scope of the arbitration clause. See, *e.g., Vulcan-Cincinnati, Inc.* v. *United Steelworkers, supra; Sinclair Refining Co.* v. *Atkinson, supra; United Furniture Workers* v. *Colonial Hardwood Flooring Co.*, 168 F. 2d 33 (4th Cir. 1948). Others state that a strike in violation of a no-strike clause is so inconsistent with the grievance and arbitration machinery that a union should not be permitted to invoke the machinery it heretofore flouted to

prevent redress for that violation. See *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union*, 235 F. 2d 108 (7th Cir.), *cert. denied*, 352 U. S. 912 (1956); *Gay's Express, Inc.* v. *International Brotherhood of Teamsters*, 169 F. Supp. 834 (D. Mass. 1959); *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, 129 F. Supp. 313 (D. Mass. 1955), *aff'd*, 230 F. 2d 576 (1st Cir. 1956). Still other cases hold breaches of no-strike clause to be not arbitrable without explicitly adopting either rationale. *Lodge No. 12* v. *Cameron Iron Works, Inc.*, 257 F. 2d 457 (5th Cir.), *cert. denied*, 358 U. S. 880 (1958); *Structural Steel & Ornamental Iron Association* v. *Shopmen's Local Union No. 545*, 172 F. Supp. 354 (D. N. J. 1959). In any event, whichever rationale was followed each of these decisions reached a contrary result from that of the Second Circuit in the instant case.

3. The decision of the Second Circuit conflicts with a prior decision of this Court.

In *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 567, footnote 4 (1960), this Court cited with approval the treatment of a violation of a no-strike clause in the opinion of the District Court of New Jersey in *Structural Steel & Ornamental Iron Association* v. *Shopmens' Local Union No. 545*, 172 F. Supp. 354 (D. N. J. 1959). In that opinion the Court refused to stay such an action pending arbitration. Thus the decision of the Second Circuit herein is in direct conflict with that of the *Structural Steel* case, which was specifically approved by this Court.

4. The second question presented is important to the Courts of Appeals in the administration of their judicial business.

This Court has never determined the effect of an even division in a Court of Appeals upon reargument *en banc*. It can be argued that such an equal division affirms the original decision of that Court of Appeals since the Court *en banc* was merely considering whether the original decision should stand on reargument. This apparently was the thinking of two of the six active Judges of the Second Circuit. This question is likely to arise in the future and thus should be resolved by this Court so that the Court of Appeals can handle such situations uniformly.

This Court has previously granted certiorari in other cases involving the procedures in determinations by Courts of Appeals *en banc*. *United States* v. *American-Foreign S.S. Corp.*, 363 U. S. 685 (1960); *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U. S. 247 (1953).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:

ROBERT ABELOW,
MARSHALL C. BERGER,
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Appendix A

DRAKE BAKERIES INCORPORATED

v.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, and Louis Genuth, Secy. Treas. etc.

United States District Court
S. D. New York.
May 4, 1960.

Weil, Gotshal & Manges, New York City, for plaintiff (Robert Abelow, New York City, of counsel).

O'Dwyer & Bernstein, New York City, for defendant (Howard N. Meyer, New York City, of counsel).

RYAN, Chief Judge.

On January 4, 1960, the plaintiff Drake Bakeries, Incorporated, instituted this suit to recover damages for an alleged breach of the "no-strike provision" of a collective bargaining agreement, pursuant to Section 301(a) of the Labor-Management Relations Act, 29 U.S.C.A. § 185.

Prior to interposing an answer to the complaint, defendant moves this Court, under Section 3 of the United States Arbitration Act, 9 U.S.C.A. § 3, for a stay of trial pending an arbitration proceeding in accordance with the terms of the collective bargaining agreement. That the Court has jurisdiction and power to enforce the arbitration clause of this contract is established now by Textile Workers v. Lincoln Mills of Alabama, 1957, 353 U. S. 448, 77 S.Ct. 912, 923, 1 L.Ed.2d 372.

Appendix A

The basic grounds upon which plaintiff opposes this application may briefly be summarized as follows: (1) The arbitration provision of the agreement is at best permissive and not mandatory; (2) The action of the union in striking in the face of the no-strike clause (Art. VII of the agreement) acted as a waiver of its rights under the grievance and arbitration provisions; (3) By failure to proceed to arbitration the defendants expressly waived their arbitration rights.

We find no merit in these contentions.

1. A reading of the provisions governing arbitration (Articles 5 and 6) shows that *all* complaints, disputes or grievances *shall* be submitted to arbitration. We find nothing permissive there and hold that this dispute is to be arbitrated.

2. Plaintiff next contends that, even if arbitration be mandatory, by violating one clause of the agreement defendants waived their rights under another clause (arbitration). We can find no logical basis for this argument, since if this premise were sustained, every violation of a collective bargaining agreement would act as a waiver of the violating party's right to arbitration, and this would destroy all arbitration agreements which are looked upon with great favor. Markel Electric Products, Inc., v. United Electrical, Radio & Machine Workers et al., 2 Cir., 202 F.2d 435. Aside from the purely logical objection to plaintiff's contention, it appears that the better reasoned decisions allow arbitration after a violation of a no-strike provision. Signal-Stat Corp. v. Local 475, etc., 235 F.2d 298, certiorari denied 354 U.S. 911, 77 S.Ct. 1293, 1

L.Ed.2d 1428; Lewittes & Sons, v. United Furniture Workers, 95 F.Supp. 851.

3. We come then to plaintiff's final contention that the union's failure to proceed to arbitration constitutes a default on the union's part and thus the union has waived its right under the arbitration provision. Since plaintiff was and is the aggrieved party and since there is no evidence before the Court that plaintiff ever attempted to proceed to arbitration by a written demand as required by Article V, Section 6 of the agreement, defendants' failure to initiate arbitration does not amount to a waiver under the circumstances.

We conclude that the arbitration agreement must be enforced and direct that an order be settled staying further proceedings in this suit.

Settle order on notice.

Appendix B

DRAKE BAKERIES, INCORPORATED,
Plaintiff-Appellant,

v.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO,
Defendant-Appellee.

No. 99, Docket 26343.

United States Court of Appeals
Second Circuit.

Argued Dec. 13, 1960.

Decided Feb. 17, 1961.

Robert Abelow, of Weil, Gotshal & Manges, New York City, for plaintiff-appellant.

Howard N. Meyer, of O'Dwyer & Bernstein, New York City, for defendant-appellee.

Before LUMBARD, Chief Judge, and SWAN and MOORE, Circuit Judges.

SWAN, Circuit Judge.

This is an appeal by plaintiff, referred to herein as Drake, from an order entered in an action filed in the court below on January 4, 1960. The action was brought pursuant to § 301(a) of the Labor-Management Relations Act, 29 U.S.C.A. § 185 (a), to recover damages for breach of a "no-strikes" provision in a collective bargaining agree-

ment between plaintiff and defendant, Local 50, referred to herein as the Union.[1] Before answering the complaint the Union moved under section 3 of the Arbitration Act, 9 U.S.C.A. § 3, to stay all proceedings in the action until arbitration was had in accordance with the terms of an arbitration provision in the collective bargaining agreement. From the order granting this motion Drake has appealed.

The affidavits in support of, and in opposition to, the motion raise no dispute as to the facts which brought the alleged strike that caused Drake to bring its action. Drake is engaged in the production and sale of cake. During the winter of 1959-1960, Christmas and New Year's Day fell on Friday. If Drake's cake was baked on the Thursday before Christmas or New Year's and sold on the Monday following these holidays it would not be fresh. This would impair Drake's competitive position with concerns which did produce cake on the Saturdays following the holidays and would injure Drake's business reputation.

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1. Section 185(a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Subsection (b) deals with the responsibility of labor organizations and employers for the acts of their agents, declares a labor organization an entity for purposes of suit, and provides for the enforcement of money judgments against labor organizations. Subsection (c) although framed in terms of "jurisdiction," deals with venue. Subsection (d) deals with service of process on labor organizations. Subsection (e) deals with determination of the question of agency.

Appendix B

On December 16, 1959, Drake gave notice to its employees and to the Shop Committee of the Union that its production employees need not work on the Thursday immediately preceding the holidays but would be expected to do so on the Saturday following them. Enough employees reported for work on the Saturday following Christmas to enable bakery products to be produced, but on the Saturday following New Year's Day only 26 out of 191 employees showed up. These were too few to engage in production and Drake was forced to close its plant on that important scheduled production date. Two days later, the present suit was filed, charging that the defendants had "instigated and encouraged" the members of the Union "to engage in a strike, a concerted stoppage, and/or cessation of services." Whether the Union breached the "no-strikes" clause and whether the rescheduling was permissible for the particular week involved we need not decide, since the only question before us is whether the District Court or an Arbitrator should determine whether the Union violated the "no-strikes" provision of the collective bargaining agreement.

The collective bargaining agreement contains provisions entitled "Grievance Procedure" (Article V), and "Arbitration" (Article VI) and "No-Strikes" (Article VII); they are set out in the margin.[2] Each article must be inter-

2. "Article V—Grievance Procedure

"(a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

"In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and

the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.

"(b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided.

"Article VI—Arbitration.

"(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

"(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

"(c) The decision of the Arbitrator shall be binding upon both parties for the duration of the contract.

"(d) Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

"(e) The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties.

"Article VII—No-Strikes

"(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision.

preted with relation to the others. Article V requires an "attempt to adjust all complaints, disputes or grievances • • involving questions of interpretation or application of any • • • matter covered by this contract or any conduct or relation between the parties hereto, directly or indirectly." This is broad language. But the second paragraph contains a very significant limitation: *"It is agreed that in the handling of grievances there shall be no interference with the conduct of the business."* [Italics added.] If grievances are not "adjusted" in accordance with Article V, "then either party shall have the right to refer the matter to arbitration as provided in Article VI." Article VII states very specifically that "There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason," with one exception, namely, *"if either party shall fail to abide by the decision of the Arbitrator, after the receipt of such decision, under Article 6 of this contract, then the other party shall not be bound*

"(b) The parties agree as part of the consideration of this agreement that neither the International Union, the Local Union, or any of its officers, agents or members, shall be liable for damages for unauthorized stoppage, strikes, intentional slowdowns or suspensions of work if:

"(a) The Union gives written notice to the Company within twenty-four (24) hours of such action, copies of which shall be posted immediately by the Union on the bulletin board that it has not authorized the stoppage, strike, slowdown or suspension of work, and

"(b) if the Union further cooperates with the Company in getting the employees to to return and remain at work.

"It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work stoppage, subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike or work stoppage."

by this provision." [Italics added.] In the case at bar no arbitrator has rendered a decision.

Reading the three articles together, we think it clear that the arbitration provided for concerns only questions brought up through the Grievance Procedure; that Article VI sets forth the mechanics, not the scope, of the arbitration, the scope being set forth in Article V; and that a breach of Article VII is not within the scope of Article V. Moreover, the Union, although it made some objection to the employer's rescheduling of work on the Saturdays following the holidays, did not request the designation of an arbitrator, as provided in clause (a) of Article VI, but resorted to the self-help of a strike in direct violation of the "no-strikes" provision of Article VII. Under these circumstances we hold that whether Article VII has been breached by an interruption of work or a temporary walk-out should be decided by the court having jurisdiction of the action brought under 29 U.S.C.A. § 185 (a), and that the order staying the action was erroneous.

In Textile Workers Union of America v. Lincoln Mills, of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972, a union had entered into a collective bargaining agreement with an employer which provided that there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure, the last step of which was arbitration. The employer having refused to arbitrate a grievance dispute, the union sued under § 185 to compel arbitration. The Supreme Court, relying upon the legislative history of the statute, held that the District Court properly decree specific performance of the agreement to arbitrate the grievance dispute. Mr.

Appendix B

Justice Douglas' opinion states at page 455 of 353 U.S., at page 917 of 77 S.Ct.:

> "• • • plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation [§ 185] does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."

Even in the absence of a specific no-strike clause, it has been held that resorting to a strike instead of utilizing the contractual arbitration machinery prevents a union from claiming that the strike must be arbitrated.[3] Where the no-strike clause is as specific as in the case at bar, it seems clear that the parties intended the grievance-arbitration procedure to supplant strikes as a means of resolving industrial disputes, but did not intend to subject alleged breaches of the no-strike clause to arbitration when a strike was resorted to before making any attempt to utilize the grievance-arbitration procedure.

Support for this conclusion is to be found in Markel Electric Products, Inc. v. United Electrical, Radio & Machine Workers, 2 Cir., 202 F.2d 435, 437, which held that the alleged breach of the no-strike provision was not "within the scope" of an arbitration clause which we read as at least as broad as the one now before us. Our con-

3. W. L. Mead, Inc. v. International Brotherhood of Teamsters, D.C.D.Mass., 129 F.Supp. 313, 315, affirmed 1 Cir., 230 F. 2d 576; Gay's Express, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 404, D.C.D.Mass., 169 F.Supp. 834.

clusion also accords with decisions in a number of other circuits.[4]

The Union's brief relies almost exclusively on this court's decision in Signal-Stat Corp. v. Local 475, United Electrical, Radio and Machine Workers, 2 Cir., 235 F.2d 298, certiorari denied, 354 U.S. 911, 77 S.Ct. 1293, 1 L.Ed.2d 1428. It should be noted, however, that Signal-Stat does not purport to overrule this court's earlier decision in Markel, but merely distinguished that case on the ground that the arbitration provision in Signal-Stat was broader. We think Signal-Stat distinguishable from the case at bar. There a dispute arose between the plaintiff employer and the defendant union concerning the discharge of two employees. The plaintiff's employees went on strike until it was eventually agreed that all employees, except the two discharged by the company, would return to work and the dispute over the discharged employees would be settled by arbitration. The plaintiff then brought its action for damages, charging a violation of the no-

4. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 25 v. W. L. Mead, Inc., 1 Cir., 230 F.2d 576; Lodge No. 12, Dist. No. 37, I.A.M. v. Cameron Iron Works, Inc., 5 Cir., 257 F.2d 467, 471, certiorari denied, 358 U.S. 880, 79 S.Ct. 120, 3 L.Ed.2d 110; International Union United Auto Aircraft v. Benton Harbor Malleable Industries, 6 Cir., 242 F.2d 536; Hoover Motor Express Co. v. Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union No. 327, 6 Cir., 217 F.2d 49; Cuneo Press, Inc. v. Kokomo Paper Handlers' Union No. 34, 7 Cir., 235 F. 2d 108. Also in accord are two decisions of the Fourth Circuit which were disapproved by this court in Signal-Stat Corp. v. Local 475, United Electrical, Radio and Machine Workers, 2 Cir., 235 F.2d 298, certiorari denied, 354 U.S. 911, 77 S.Ct. 1293, 1 L.Ed.2d 1428, discussed infra. See United Electrical, Radio and Machine Workers v. Miller Metal Products, Inc., 4 Cir., 215 F.2d 221; International Union United Furniture Workers v. Colonial Hardwood Flooring Co., 4 Cir., 168 F.2d 33.

strike clause. That clause did not have the significant exception contained in Drake's to the effect that a strike was permissible only if the other party had failed to abide by the decision of the Arbitrator after receipt of such decision. Moreover there, unlike the case at bar, the parties had already agreed to end the strike and to arbitrate the dispute which was the cause of the strike before the plaintiff brought suit. While Signal-Stat has frequently been cited and followed for other rules there enunciated,[5] our research reveals only two District Court cases in which it was relied upon to hold that an alleged breach of a no-strike clause is an arbitrable issue,[6] and only one other in which that part of the Signal-Stat opinion was cited with approval,[7] although several courts, in post Signal-Stat cases, have followed Markel.[8]

For the foregoing reasons we think it was error to stay the action. The order is reversed.

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5. E. g., Judge Learned Hand's opinion in Council of Western Electric Technical Employees—National v. Western Electric Co., 2 Cir., 238 F.2d 892, 895.

6. Tenney Engineering, Inc. v. United Electrical, Radio and Machine Workers of America, Local 437, D.C.D.N.J., 174 F. Supp. 878; Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, United Rubber Cork, Linoleum and Plastic Workers, D.C.D.Conn., 167 F.Supp. 817.

7. Butte Miners' Union No. 1 of International Union of Mine, Mill and Smelter Workers v. Anaconda Co., D.C.D.Mont., 159 F.Supp. 431.

8. Lodge No. 12, Dist. No. 37, I. A. M. v. Cameron Iron Works, Inc., 5 Cir., supra note 4; International Union, United Auto Aircraft v. Benton Harbor Malleable Industries, 6 Cir., supra note 4; Gay's Express, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local No. 404, D.C.D.Mass., 169 F. Supp. 834; Structural Steel & Ornamental Iron Ass'n v. Shopmens' Local Union No. 545, D.C.D.N.J., 172 F. Supp. 354. The conflict between Structural Steel, supra, and Tenney Enginneering, supra note 6, has not yet been resolved by the Third Circuit.

Appendix C

DRAKE BAKERIES INCORPORATED, Plaintiff-Appellant,

v.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendant-Appellee.

No. 99, Docket 26343.

United States Court of Appeals
Second Circuit.

Submitted April 25, 1961.

Decided Sept. 12, 1961.

Weil, Gotshal & Manges, New York City (Robert Abelow, Milton Haselkorn and Marshall C. Berger, New York City, on the brief), for plaintiff-appellant.

O'Dwyer & Bernstein, New York City (Howard N. Meyer, New York City, on the brief), for defendant-appellee.

Rubenstein & Rubenstein, New York City (Jerome S. Rubenstein, New York City, on the brief), for International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL-CIO, amicus curiae.

Edward Maguire and Herman A. Grady, New York City, for New York State AFL-CIO, amicus curiae.

Before LUMBARD, Chief Judge, and CLARK, WATERMAN, MOORE, FRIENDLY and SMITH, Circuit Judges.

PER CURIAM.

This case was submitted to and considered by the active judges of this court after a majority of them had voted to grant the appellee's motion for rehearing en banc. Judges Clark, Waterman and Smith vote to affirm the

order of the District Court for the Southern District of New York, reported at 196 F.Supp. 148. They point to the three recent decisions of the Supreme Court in United Steelworkers of America v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; United Steelworkers of America v. American Mfg. Co., 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; and United Steelworkers of America v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424. Judges Lumbard, Moore and Friendly, not considering these decisions to be controlling, agree with the views of a panel of this court as expressed in an opinion written by Judge Swan and reported at 2 Cir., 1961, 287 F.2d 155 which reversed the order of the District Court.

Four judges are of the view that under such circumstances the order of the District Court is affirmed. Judges Lumbard and Friendly dissent and are of the opinion that under such circumstances the opinion of a panel of this court, reported at 287 F.2d 155, remains in effect and should not be withdrawn.

Accordingly the opinion reported at 287 F.2d 155 is withdrawn and the order of the District Court is affirmed.